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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
EMIL DIECKERHOFF ET AL. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT AND BRIEF.

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The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled cause, reversing the judgment of the Circuit Court for the Southern District of New York, and remanding the case for a new trial.

The point involved is an importer's liability upon a bond for the return to the collector of unexamined merchandise, provided for by section 2899 Revised Statutes (set out hereafter), and commonly termed the importer's redelivery bond.

The Circuit Court of Appeals held the Government can only recover damages actually proved, although such proof, by reason of the importer's failure to return the goods, is practically impossible.

This construction defeats the very object of the statute—to protect the United States against mistake and fraud, and is besides repugnant to the decisions of this court and the applicable principles of law and equity.

The Government maintains it is entitled to recover either double the estimated value of the importation—the penalty or forfeiture imposed by the statute, or, as the Circuit Court held, double the estimated value of the package not returned, as liquidated damages under the terms of the bond.

The question is of special importance. If the decision of the Circuit Court of Appeals is correct, administration of the customs will be greatly embarrassed. Under it a redelivery bond affords no reasonable protection, since it is practically impossible to show the damage suffered by the United States when the only adequate evidence of fraud or error—the package itself—has been destroyed by the importer. It would be no longer possible with safety to allow importers to withdraw without examination the bulk of their importations, as has been the practice for years and as the statute contemplates; and the Government would be obliged either to take enormous risks of being defrauded or to erect great warehouses for storing *all* imported goods pending their examination and appraisal.

The practice for many years, fully authorized by law, has been to send to the public stores and cause to be examined one package out of every ten, the others being delivered at once to the consignee, bond

being given. Even this entails an enormous amount of work and expense. If *all* packages must hereafter be examined, it is manifest the result to the Government will be disastrous. And if examination of all be not made, then under the rule laid down by the Circuit Court of Appeals the door to extensive frauds will be wide open. If an importer has only to pay the damage which the Government can show after he has destroyed the only adequate evidence, the temptation to commit fraud will be too strong for universal resistance.

The opinion and judgment of the Circuit Court of Appeals are decisive of the important point in issue, and it appears of great importance to the Government to know *at once*, and without waiting for a technically final adjudication, what the law is, so that the revenues may be properly protected. The real point in issue can be passed on now just as readily as at any future time. At the trial the Government conceded, as hereafter stated, that it could not, the package having been destroyed, prove its damage; so there will be nothing for the Circuit Court to do upon a new trial but to enter judgment for the respondents in accordance with the opinion of the Circuit Court of Appeals.

STATEMENT OF CASE.

December 21, 1896, respondents, copartners in business in the city of New York under the firm name of Dieckerhoff, Raffloer & Co., and their sureties, executed the following bond:

> Bond for six months, to cover the delivery of unexamined packages.
>
> Know all men by these presents that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.
>
> The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the

officers of the customs; or if the above-bounded obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof.

Sealed with our seals this twenty-first day of December, one thousand eight hundred and ninety-six.

(Sgd.) DIECKERHOFF, RAFFLOER & Co., [L. S.]
By R. ERBSLOB. [L. S.]
(Sgd.) CARL F. BOKER. [L. S.]
(Sgd.) JOHN ACHELIS. [L. S.]

Sealed and delivered in the presence of—
(Sgd.) W. A. COURSEN.

January 13, 1897, respondents imported and entered at the custom-house, New York, seven packages of merchandise, numbered 417 to 421 inclusive, and 983

and 984. At the time of entry the collector designated package No. 418 to be sent to the public stores for examination and appraisal. The remaining packages were delivered in pursuance of section 2899 Revised Statutes and in reliance upon the bond, upon which the collector indorsed the estimated value of the whole importation, $1,522. (R., 13, 14.)

On or about January 18, 1897, and within ten days after package No. 418 had been examined and appraised, the collector ordered respondents to return package No. 420, which they failed to do. (R., 15.)

The United States brought suit upon the bond, praying judgment, in their amended complaint, for $3,044, double the estimated value of the importation. (R., 15.) The estimated value of package No. 420 was alleged to be $185 and of the invoice containing it $806. (R., 14.)

Respondents demurred. (R., 38.) The Circuit Court, Townsend, J., overruled the demurrer, holding that "upon the complaint as it stands plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated value of the packages called for and not returned." (R., 39, 41.)

Respondents then answered, denying breach of the bond, and also that by reason of any fact alleged the United States had suffered any damage whatever. (R., 17.)

The case was tried by a jury before Judge Coxe. The United States called as a witness a clerk in the custom-house, who testified, against respondents' ob-

jection, that the value of package No. 420, as estimated from the invoice itself as of the time of the entry, was $184.56. (R., 25.) No further evidence was offered by the Government.

Respondents admitted that the collector called on the importer for the return of package No. 420, and that the same was not returned. (R., 25.) They offered no evidence. (R., 26.)

Counsel for the Government conceded there was no proof that the United States had suffered any damage by reason of respondents' failure to return the package, and that there could be no such proof. (R., 26.)

Motions to direct a verdict for respondents and their sureties having been overruled (R., 27), the United States moved the direction of a verdict in its favor for twice the estimated value of the package not returned, $369.12, which was granted. (R., 27.)

Judgment for the amount of the verdict and costs were entered. (R., 20.)

Upon appeal the Circuit Court of Appeals reversed the judgment and remanded the case for a new trial. (R., 44, 49.)

The majority of that court held the Government could only recover damages proved to have been actually incurred. Judge Wallace was of opinion that the measure of damages was the value of the package not returned. (R., 50.)

THE STATUTES.

There was no provision of law for appraising imported merchandise until 1823. Prior to that time appraisal was made only of goods with no invoice, of damaged goods, or where the collector suspected fraud. (*Greely* v. *Thompson*, 10 How., 225, 235–236.)

The act March 1, 1823, chapter 21, section 15 (3 Stats., 729, 735), required at least one package out of every invoice or every twenty packages to be examined, and if it did not correspond with the invoice or was falsely charged a full inspection was directed. Packages containing any article not described in the invoice were to be forfeited, with power in the Secretary of the Treasury to remit if in his opinion it was done by mistake and not to defraud.

A similar provision was contained in act May 28, 1830, chapter 147, section 4 (4 Stat., 409, 410), which also provided for delivering the packages not held for examination to the importer upon giving a redelivery bond. This is the original of section 2899 Revised Statutes.

The act August 30, 1842, chapter 270, section 21 (5 Stat., 565), provided for examination, forfeiture, etc., and increased the number of packages to be examined to at least one out of every ten—now section 2901 Revised Statutes.

The act July 27, 1866, chapter 284, section 1 (14 Stat., 302), contained specific directions to the collector of the port of New York in regard to examination and appraisement—now section 2939 Revised Satutes.

The sections of the Revised Statutes referred to follow:

SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall in either case be forfeited.

SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified

in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

ARGUMENT.

I.

No question was made below as to the form of the bond in suit. Under section 2899 a separate bond could be exacted upon each entry, but for convenience the Secretary of the Treasury as early as 1857 authorized the taking of a general bond running for six months. By indorsing upon this bond the estimated value of each importation it is transformed into a series of separate bonds with penalties in double the estimated value of the importation, as provided by section 2899 Revised Statutes.

The Government maintains that the sum named—double the estimated value of the importation—is a penalty or punishment imposed by law for violating a duty enjoined by law, and that for a breach of the bond the whole amount may be recovered without proof of damage.

This was the view taken in *Clark* v. *Barnard* (108 U. S., 436), which is believed to control this case. The bond in that case was in the penal sum of $100,000, conditioned that the company giving it should complete its road within a specified time. The court held:

> That the sum named in the bond in question was not a penalty to secure the performance of a condition, which could be discharged on payment of such damages as might be proved to have arisen from nonperformance; but it was in the nature of a statutory penalty for the nonperformance of a statutory duty, and that it

> was not necessary for the State to show any actual damage or injury from the breach, in order to be entitled to recover when the breach was proved.

In that case the whole subject was fully considered, upon principle and authority.

Clark v. *Barnard* was followed by the Circuit Court of Appeals for the Fifth Circuit in *The S. Oteri* (67 Fed., 146, 151). Section 2979 Revised Statutes requires an importer on withdrawing goods for export to give the collector "satisfactory security" that the merchandise shall be landed out of the United States. The Treasury regulations provided that in cases of withdrawal for export the exporter should give bond "with satisfactory security in a penal sum equal to double the amount of the estimated duty on the goods." Held:

> That an export bond given in the sum of $1,000 without containing any reference to the amount of estimated duties on the goods withdrawn was valid, and that the Government was entitled, upon breach of the condition, to recover the whole amount of the bond, and was not limited to a judgment for double the amount of duties as subsequently estimated.

Clark v. *Barnard* was also followed in *Nilson* v. *Jonesboro* (57 Ark., 168, 177), suit upon a contract providing for the forfeiture of a stipulated sum for failure to complete a street railway within a specified time, the entire amount being held to be forfeited, and in *State* v. *Hall* (70 Miss., 678, 682) relating to a county treas-

urer's bond, where the statutory penalty—double the deficit—was held to be recoverable.

In *United States* v. *Montell* (Taney's Cir. Ct. Dec., 47) the court held, as stated in *Clark* v. *Barnard*, that a sum secured by bond with sureties under act of Congress of December 31, 1792, conditioned that the registry of a vessel should be used solely for it and returned to the collector upon certain contingencies, was "a penalty or forfeiture inflicted by the sovereign power for a breach of its laws, not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offense, and not the less so because security is taken before the offense is committed, in order to secure the payment of the fine if the law should be violated." (108 U. S., 458.)

In *United States* v. *Hatch* (1 Paine, 336), Circuit Court, Second Circuit, bond had been given by the master under act February 28, 1803 (sec. 4576, R. S.), conditioned for the exhibition of the list of his ship's company to the first boarding officer at first port of arrival in the United States and production of the crew. The court held the sum named in the bond was intended as a forfeiture and not as a penalty to cover damages assessed, the impossibility of assessing the damages contemplated being pointed out.

In *United States* v. *Pingree* (1 Sprague, 339), District Court, Massachusetts, an additional duty of 100 per cent secured by a bond taken under act of 1854, chapter 30, conditioned for transporting and warehousing an importation, was treated as a penalty imposed

for a violation of law and a verdict for the full amount rendered. Upon motion in arrest of judgment the court held the 100 per cent penalty was on the original duty, but upon appeal the Circuit Court decided it was on the invoiced value of the goods as taken in the bond. (Andrews' Revenue Laws, 102.)

Relief from penalties and forfeitures is peculiarly a matter of equity jurisdiction. Originally there was no remedy at law, but now by statute in England and this country it is otherwise, although some cases not within the purview of the statutes are still cognizable in equity alone. (Story Eq. Jur., sec. 1301.) The ground upon which equity interferes is (Id., sec. 1314)—

> that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof or the damage really incurred by the nonperformance. In every such case the true test (generally, if not universally) by which to ascertain whether relief can or can not be had in equity is to consider whether compensation can be made or not. If it can not be made, then courts of equity will not interfere.

Tested by these principles alone a court of equity would refuse to interfere in this case, for, manifestly, compensation can not be made for the wrong the United States may suffer by breach of importers' re-

delivery bonds. But the case is controlled by another principle (Story Eq. Jur., sec. 1326):

> Where any penalty or forfeiture is imposed by statute upon the doing or omisson of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture if incurred, for it would be in contravention of the direct expression of the legislative will.

This principle was applied in *Clark* v. *Barnard, supra.*

This is an action at law. Respondents contend, however, that section 961 Revised Statutes is applicable.

> SEC. 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, *the court shall render judgment for the plaintiff to recover so much as is due according to equity.* And when the sum for which judgment should be rendered is uncertain it shall, if either of the parties request it, be assessed by a jury.

This statute applies only "where the forfeiture, breach, or nonperformance shall appear by the default or confession of the defendant, or upon demurrer." In this case there was a demurrer, which was overruled, and the respondents afterwards answered denying the breach, but admitted it upon the trial. It is questionable, therefore, whether the statute applies; but assuming it does, the court is directed by it to render judgment for the plaintiff "to recover so much as is due

according to equity." We are therefore relegated to the principles of equity, which, as has been shown, authorize the recovery of the whole penalty in a case like this. Such was the view of section 961 taken in *The S. Oteri* (67 Fed., 150, 151), above cited.

II.

The Circuit Court directed a verdict for the Government for twice the amount of the estimated value of the package not returned. In his opinion overruling the demurrer Judge Coxe held the Government was entitled to recover that amount as liquidated damages. This conclusion was doubtless based upon the fact that the bond provides as an alternative for the return of the packages delivered the obligors shall "pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned."

This condition is not in the statute, but it is not believed to be necessarily void for that reason; certainly not if the penalty fixed by the statute—double the estimated value of the whole importation—is to be treated simply as security for the payment of damages. In that view, the Secretary of the Treasury would be fully authorized to stipulate for liquidated damages, and having fixed upon double the amount of the package not returned as an equivalent, the Circuit Court was justified—proceeding under section 961 Revised Statutes "according to equity"—in holding that sum to be liquidated damages, because of the impossibility of determining the real damage

In support of the authority of the Secretary of the Treasury to stipulate in the bond for liquidated damages, see:

United States v. *Tingey*, 5 Pet., 115.
United States v. *Bradley*, 10 Pet., 345.
United States v. *Hodson*, 10 Wall., 395.
Jessup v. *United States*, 106 U. S., 147.
Constable v. *National Steamship Co.*, 154 U. S., 79.
The S. Oteri, 67 Fed., 146.
Stephensen v. *Monmouth Min. and Mfg. Co.*, 84 Fed., 115.
Grady v. *United States*, 98 Fed., 240.

In *United States* v. *Tingey* the court said (5 Pet., 127):

> It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, chapter 47, and is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him and for all public property committed to his care, whether officially as purser or otherwise. Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general

> right of sovereignty; and the United States being a body politic may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers.

Under the authorities cited, the bond in question, being a voluntary one, if not authorized by the statute, would be good as a common-law bond.

In *Moses* v. *United States* (166 U. S., 571, 586) the court said:

> The consideration or condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se.* Otherwise, and for all purposes of security, a bond may be valid though no statute directs its delivery.

III.

If the condition referred to be not authorized, or in conflict with the penalty named in the statute, the bond is not void even as a statutory bond, but, the condition being severable, the statutory penalty may be recovered.

In *United States* v. *Mora* (97 U. S., 413), the court held:

> Where the conditions of a bond which are not sustainable are severable from those which are, the latter hold good *pro tanto.*

In that case the act of May 20, 1862, authorized the Secretary of the Treasury to require reasonable security

that goods be not transported in vessels to any place under insurrectionary control, nor in any way used in giving aid or comfort to the enemy. The court held a bond taken from a shipper by the collector for that purpose, under the Secretary's regulations, in double the value of the goods shipped, was reasonable security within the meaning of the act.

The court apparently assumed that for a breach of the bond the United States would have been entitled to recover the entire penalty. Manifestly it would have been impossible for the Government to show the actual damage it sustained from the delivery of goods to insurgents.

So here proof of damage is impossible. It was so conceded by the Government at the trial.

IV.

Unless the Government can recover upon redelivery bonds either double the value of the package or packages not returned as liquidated damages, or double the estimated value of the importation as "a statutory penalty for the nonperformance of a statutory duty" (*Clark* v. *Barnard*), such security can no longer be taken, and the purpose of the statute, which is to release the Government from warehousing the entire importation pending examination and appraisal, as well as for the convenience of the importer, will be defeated. This would seem to point to the proper construction of the statute.

HENRY M. HOYT,
Solicitor-General.

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